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Some Recent Developments in Canadian Constitutional Theory with Particular Reference to Beatty and Hutchinson

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Some Recent Developments in Canadian Constitutional Theory with Particular Reference to Beatty and Hutchinson

Richard F. Devlin

This article provides a critique of recent books by two prominent Canadian constitutional theorists—David Beatty’s Constitutional Law in Theory and Practice and Allan Hutchinson’s Waiting for CORAF: A Critique of Law and Rights. Devlin begins with a brief overview of the various positions that have been staked out in writing on the Canadian Charter of Rights and Freedoms during the last decade. He identifies three broad constituencies: Charter advocates who assume that rights are an “unqualified human good” and that judicial review is an important check on majoritarian zealotry; Charter critics who emphasize the undemocratic nature of judicial review and who doubt the beneficence of a rights-dominated regime; and “progressive deviationists” who are somewhat nervous of both rights discourse and judicial review but who seek to make the best of an imperfect set of constitutional institutions. According to Devlin, Beatty and Hutchinson represent the first and second of these positions, Beatty being a fervent advocate of the Charter and judicial review and Hutchinson an unapologetic critic of both. Beatty argues that a constitution can insulate basic rights from contamination by the contingencies of politics, and that the courts should use the principles of rationality and proportionality, rather than perceptions of legislative intent, in scrutinizing government action for compliance with the constitution. Hutchinson, in contrast, argues for what he calls a dialogic model, maintaining that because political decision-making is rooted in electoral democracy, it is more legitimate than judicial decision-making. Devlin places himself closer to Hutchinson than to Beatty, but he questions the ability of Hutchinson’s dialogic model to provide a sufficient means to move from rights talk and social inequality to democratic and social equality.

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Introduction

In an article published at roughly the same time as the Charter came into force, Rod MacDonald lamented that “the summer of 1982 will undoubtedly be remembered for the quiescence of Canadian legal theorists.” In the ensuing 14 years the scene has changed dramatically. There are a large number of Canadian scholars who approach law, and in particular constitutional law, in an explicitly jurisprudential fashion, and they have produced an almost unmanageable body of work. Much of it, in my opinion, is of very good quality.

In the course of 1995, the University of Toronto Press published books by two of the most prodigious constitutional theorists of the last 15 years: David Beatty’s Constitutional Law in Theory and

Practice⁴ and Allan Hutchinson’s Waiting for Coraf: A Critique of Law and Rights.⁵ Each book is an attempt by the author to pull together in one volume much of their scholarship on constitutionalism over the last decade or so, and to hone, refine and clarify some of their earlier work. Both succeed quite admirably. These are not simply collections of previously published essays vaguely held together by some superficial preface. Rather, they are serious attempts by Beatty and Hutchinson to provide coherent and sustained arguments in pursuit of their own constitutional visions. Both books are provocative and generate reflection and engagement; both appeal to certain deep seated constitutional sensibilities and yet both seem flawed — each is passionately argued but somehow they both come across as being somewhat ‘over the top’. Because of these strengths and weaknesses they provide us with an opportunity to take a snapshot of the state of contemporary Canadian constitutional theorizing.

This review essay will first attempt to locate each of the authors in the broader constitutional theoretical ‘langscape’.⁶ Secondly, I will outline and then assess the persuasiveness of the arguments of each of the authors. Finally, I will offer some tentative conclusions. It should be noted at the outset that the ambitions of this essay are very modest. There is no attempt to suggest that I have a better constitutional theory to offer; this should not be read as a ground-clearing prolegomenon for some new vision. What follows is an unapologetic (but hopefully constructive) critique.


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I. The Debate Over the Legitimacy of Judicial Review and the Constitutional Entrenchment of a Charter of Rights

While it is true that debates about the legitimacy of judicial review predate the Charter, there is little doubt that concerns about this issue have taken on a particular urgency among academics in the last 15 years. Indeed, as I have argued elsewhere, the focus on rights discourse and judicial review has become the dominant jurisprudential preoccupation for a large number of Canadian constitutional theorists, sometimes ad nauseam. Many attempts have already been made to delineate the various positions that might be held. Bakan is manichean, splitting the terrain between sceptics and believers; Weiler identifies pure market libertarians (a nonexistent breed in Canada), liberal romantics, radical cynics and pragmatic pluralists; Etherington talks about realists, liberal romantics and liberal pragmatists; while Herman spotlights debunkers, promoters, reactionaries and pragmatists.

7. “Anglophone Legal Theory”, supra note 3. In this section I confine my discussion to Canadian legal academics, therefore ignoring the important parallel debates among, for example, Canadian political scientists or, more generally, American legal theorists. For a very helpful discussion of Canadian political science in this regard see A. Dobrowolsky, “The Charter and Mainstream Political Science: Waves of Practical Contestation and Changing Theoretical Currents” in D. Schneiderman & K. Sutherland, eds., Charting the Consequences: The Impact of the Charter of Rights on Law and Politics in Canada (Toronto: University of Toronto Press, 1996) [forthcoming].
As I read the literature there appear to be three broad constituencies: Charter advocates who assume that rights (like the rule of law) are an “unqualified human good”\(^\text{12}\) and that judicial review is an important check on majoritarian zealotry; Charter critics who worry about the undemocratic nature of judicial review and problematize facile assumptions about the beneficence of a rights dominated regime; and progressive deviationists who, while somewhat nervous of both rights and judicial review, seek to make the best of an imperfect but potentially negotiable set of constitutional discourses and institutions. Each of these perspectives merits further discussion.

The dominant intellectual paradigm in Canadian jurisprudence presumes that rights are both natural and unequivocally desirable. Drawing on the spectre of an unfettered majoritarianism, advocates of an entrenched Charter argue that the more rights we have, the better.\(^\text{13}\) Viewed from this perspective, the juridical history of Canada is one of inexorable (if slow) improvement as we moved from a shaky common law regime of inchoate rights, to the statutory recognition of rights and then to the constitutional entrenchment of rights.\(^\text{14}\) Jurists who subscribe to such a perspective envi-

sion the Charter as a normative and institutional structure designed to encourage both the courts and the legislators to maximize human rights and social justice. However, if there is conflict between the legislatures and the courts, most rights advocates tend to argue that the courts should have the last word, not only because they are likely to be the strongest guardians of minority interests, but also because the Charter itself provides objective and determinative right answers. Importantly, many rights theorists emphasize that the judicial enforcement of rights is grounded in principle—not policy, politics or power. The call is for judicial “statesmanship” and “constitutional fidelity.”

Others, however, are unimpressed and advance several arguments against the ideology and practice of ‘Charterization’. First, critics argue that judicial review is undemocratic because judges are

Equality Rights (Toronto: Carswell, 1990) 1; W. Tarnopolsky, “The Evolution of Judicial Attitudes” in Mahoney & Martin, ibid. at 378; and L.E. Weinrib, “The Supreme Court of Canada and Section One of the Charter” (1988) 10 Supreme Court L.R. 469 [hereinafter “Section One”].


17. Slattery, supra note 15; and Whyte, supra note 13.


unelected and therefore unaccountable. Moreover, judges are said to be unreflective of the class, race, gender, (dis)abilities, sexual orientations or political preferences of the larger Canadian society.

Particular attention has been focused on the hostility of the courts to rights claims by unions as manifested in: *Dolphin Delivery* where it was held that there is no right to secondary picketing; the Labour Trilogy where it was held that freedom of association does not include the right to strike; and the *B.C.G.E.U.* case in which the right to picket, though recognized as a form of expression under s. 2(b), could be justifiably restricted under s. 1. Inversely, the courts are identified as having a pro-business tendency in, for example, their somewhat formalistic and legalistic recognition of corporations as persons and the correlative entitlement to the panoply of *Charter* rights.

Second, and closely related, is the argument that a public preoccupation with *Charter* and rights arguments tends to subordinate and colonize other forms of political debate and mobilization. Such a dynamic prioritizes litigation rather than participation and recon-

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23. Bakan, supra note 8.


29. Bogart, supra note 22 at c. 1; J. Fudge, “The Effect of Entrenching a Bill of Rights upon Political Discourse: Feminist Demands and Sexual Violence in Canada”
structs citizens as ‘petitioners’. This situation is compounded by
the danger that litigational politics tends to catapult lawyers into the
position of a political vanguard; a vanguard that is disconnected
from broader social causes.

Third, Charter politics are accused of being elitist in that only the
institutionally well positioned or the affluent can afford to utilize
the courts — the Lavigne case is said to have cost the unions
about $400,000 and rumour has it that the Women’s Legal
Education and Action Fund (LEAF) may have spent up to $1 mil-

Fourth, it is argued that in both form and structure the Charter
advances individualism, consolidates essential capitalist legal rela-
tions and undercuts solidarity and collectivism in that it favours
freedom of the individual from state intervention when a caring
society requires such state intervention to equalize and redistribute
social goods. Chief Justice Dickson’s (as he then was) liberal indi-

30. Mandel, supra note 22 at xi-xii.
S. Razack, Canadian Feminism and the Law: The Women’s Legal Education and
Forward or Two Steps Back (Ottawa: CACSW, 1989).
Andrews].
36. L. Apland & C. Axworthy, “Collective and Individual Rights in Canada: A
Perspective on Democratically Controlled Organizations” (1988) 8 Windsor Y.B.
Access Just. 44; Bogart, supra note 22 at 125; Brodsky & Day, supra note 32; R.C.
Windsor Y.B. Access Just. 128; J. Fudge, “What Do We Mean by Law and Social
Agenda” (1987) 45:6 Advocate 857; and Webber, supra note 29 at 218-221.
v. Southam,\textsuperscript{37} Big M Drug Mart\textsuperscript{38} and Oakes\textsuperscript{39} are often targeted here.\textsuperscript{40}

Fifth, it is argued that the courts are an inappropriate forum for social policy making because: a) judges are ill-equipped to deal with large-scale social issues; b) the exceptionalism and specificity of individual cases unduly decontextualizes the complexity of the issues;\textsuperscript{41} and c) when legalized, all public social problems tend to be re-encoded and repackaged as issues of private individual rights which can only generate zero-sum solutions.\textsuperscript{42} Again, labour relations are frequently cited.

Finally, due to their abstraction, rights discourse and legal reasoning are identified as deeply indeterminate and therefore capable of diverse interpretations depending on the ideological preferences of the judges and the contexts in which such interpretations are invoked.\textsuperscript{43} Moreover, there is the problem of causal indeterminacy. That is, the long term and broader social impact of a particular decision or set of decisions is extremely difficult to predict.\textsuperscript{44} In short, the symbolism of a ‘rights victory’ may not have any concrete social impact.\textsuperscript{45}

\textsuperscript{40} Mandel, supra note 22; and Petter, supra note 28 at 493-498.
\textsuperscript{42} Mandel, supra note 22 at 171; Petter, supra note 28 at 478; and Webber, supra note 29 at 225-227.
\textsuperscript{43} “Public/Private Distinction”, supra note 41 at 532-533; Petter, supra note 28 at 486; and Webber, supra note 29 at 227-229.
\textsuperscript{44} Bogart, supra note 22 at c. 2, 5; “Public/Private Distinction”, supra note 41 at 536; and H.J. Glasbeek, “A No-Frills Look at the Charter of Rights and Freedoms: or How Politicians and Lawyers Hide Reality” (1989) 9 Windsor Y.B. Access Just. 293 at 349-351.
\textsuperscript{45} J. Bakan & D. Pinard, “Getting to the Bottom of Meech Lake: A Discussion of Some Recent Writings on the 1987 Constitutional Accord” (1989) 21 Ottawa L. R.F. Devlin
Dichotomies rarely capture the full panorama of perspectives.\textsuperscript{46} Thus it can be suggested that distinct from the faithful and the skeptics there may be a third category of jurists who, very roughly, might be described as the 'progressive deviationists'.\textsuperscript{47} They are united in a couple of beliefs. First, deviationists accept that, for better or worse, judicial review is a constitutional fact and that it is therefore essential to focus on what can best be done with this reconfiguration of social institutions. Second, they argue that rights have no inherent or essential meaning. Rather, they are social constructs that have been imagined and given concrete form at certain historical conjunctures. Consequently, they are capable of being remade in the contemporary historical moment. Third, given this plasticity, rights can be reconceptualized, reinterpreted and rearticulated not solely as exclusive fences to protect the individual, but also as relational and communitarian interests that entitle citizens to pursue social goods. Fourth, deviationists argue that such an open-ended vision of rights can allow for significant differential treatment and an expansive pluralist tolerance in constructing social, legal and constitutional policies. Fifth, this pursuit of difference can be most effectively achieved if citizens and judges conceive of rights claims as part of an ongoing mutually empathetic social conversation. Sixth, at the level of strategy, deviationists argue: a) negative rights are extremely valuable for those who are still the victims of discrimination; b) rights generally can serve as a medium of personal valorization; c) rights discourse can operate as a potent form of (counterhegemonic) consciousness-raising, resistance and mobilization and, therefore, it cannot be abandoned as a potential political platform; and d) the achievement of a rights claim can send an important symbolic message to the broader society.


Herman, Nedelsky and Trakman are probably the most explicit spokespersons for this perspective but I would suggest that it also informs the legal philosophy of many feminists, self-described egalitarian liberals and some post-liberals.

In their previous works both Beatty and Hutchinson have aligned themselves with, and been primary spokespersons for, two of these


There are of course differences, most notably Herman's socialist feminism renders her less optimistic than Nedelsky and Trakman. It is to be noted however that Trakman's optimism seems to have faded as 1995 wore on. See e.g. L.E. Trakman, "The Demise of Positive Liberty?" (1995) 6 Con. Forum 71; and L.E. Trakman, "Section 15: Equality? Where?" (1995) 6 Con. Forum 112.


positions: Beatty as a fervent advocate for both a *Charter* and judicial review and Hutchinson as an unapologetic critic of both. Despite these differences there are, as we shall see, certain commonalities: first, they both accept that the words of a constitutional text are deeply indeterminate; and second, they are both very critical of the record of the Supreme Court of Canada. Where they differ is in their interpretation of the significance of these analyses. Beatty’s project is an exercise in redemption and salvation. Hutchinson’s is an exercise in reconsideration and re-orientation. My sympathies tend to lie with Hutchinson, though I have reservations about both.

II. Beatty’s Grand Theory

A. The Thesis Described

*Constitutional Law in Theory and Practice*²² is simultaneously a rearticulation, refinement and expansion of an argument that David Beatty has been working on for at least 10 years. Stated at its most ambitious, his project is to provide an account of the possibility, intelligibility, objectivity and integrity of law;³³ to develop a theory that allows us to distinguish law from politics; and finally to construct a mechanism that will enable us to subordinate politics to law.³⁴ For Beatty, constitutional law — and in particular a regime of judicially enforceable rights — is the primary vehicle through which modern society can achieve these not insubstantial feats.

More specifically, Beatty’s aim is to provide a justificatory account of what he calls “constitutional supremacy”, the idea that a constitution (a.k.a. “the mother of all laws”)³⁵ can provide determinative parameters for social organization that are uncontaminated by the contingencies of politics.³⁶ This, of course, immediately runs into

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³⁴. *Ibid.* at 9, 156.
the difficult problem that not all constitutions share the same substantive vision, organizational structure or discursive form. But Beatty has an answer to this, one that appears to be more procedural than substantive. His argument is that all constitutions have an inherent purpose (an “inner logic,” perhaps even an “inner morality”: they function not so much to recognize or allocate rights as they do to constrain the leviathanic potential of public power.

This is where judicial review enters the scene. Obviously a constitution is not self-activating, it needs someone or something to operate on its behalf. Moreover, constitutions are usually, though not always, written in highly abstract language that needs to be rendered concrete enough to generate results in specific situations. For Beatty this is the function of judges: to be the “guardians of the constitution.” But the manifest problem is the familiar question of, who is to guard the guardians? It is Beatty’s reply to this that forms the core of his argument: the constitution itself gives rise to two principles of justification that predetermine not only the scope of executive, legislative and administrative power, but also judicial power. In other words, judicial review is legitimate to the extent that it “dispassionately, impartially” and “faithfully” conforms with what Beatty calls the proportionality and rationality principles.

These principles relate to both ends and means. The proportionality principle (which he also describes as the consistency, anti-discrimination or equality principle) engages in a type of cost-benefit analysis by inquiring whether the public interest justifies the pro-
posed limitation on an individual or group. In short, proportionality asks if the ends are justified. The rationality principle (which he also calls the necessity principle) focuses on means. It inquires whether there are other less invasive policies or instruments available. If so, then state action can be invalidated by the courts. For Beatty, perfection appears to entail minimal state intervention. Thus he argues that these are not simply interpretive principles, but rather standards that impose a significant justificatory burden upon the state and its agents.

Beatty spends a great deal of effort addressing the attributes of these principles. They appear to have two sets of qualities: sufficient specificity and adequate determinacy to constrain judicial discretion; and, at the same time, a generality that renders them universally valid and attractive. First, he is emphatic that these two principles enable him to: resurrect and defend the integrity of law, ... [to] reveal an overarching, unified method of constitutional review that does distinguish, in an objective and principled way, between laws that are constitutional and those that are not. Thus, he has no doubt that they are capable of guiding, binding and even controlling judges, and that this justifies his proposition that judicial review is compatible with democracy. Second, he claims that the proportionality and rationality principles constitute “general standards of justice.” More ambitiously, he proclaims that:

... few students take issue with the idea that Canadian constitutional law is ... about how two basic principles of rationality and proportionality have provided the

65. Ibid. at 15-16.
66. Ibid. at 111.
67. Ibid. at 17, 105.
68. Ibid. at 144.
69. Ibid. at 15.
70. Ibid. at 9.
71. Ibid. at 156.
72. Ibid. at 152.
73. Ibid. at 104.
Court with the same framework of analysis from beginning to end. Nor do they dispute the claim that these principles give expression to timeless ideals of equality, justice, and personal autonomy. The rationality requirement, which obliges all those entrusted with the legal powers of the state to use the most moderate means possible to pursue their political goals, maximizes the freedom of individuals and smaller communities to control their own destinies. And the ends-oriented principle of proportionality, or consistency guarantees a measure of equality of treatment by insisting that whatever restrictions are imposed on personal autonomy, or the sovereignty of one or other order of government, must be roughly equal to the kinds of constraints others have been made to endure.74

Moreover, Canada appears to be too provincial for the ambitions of this theory. Beatty’s aim is even grander still: to argue that “the basic principles of constitutional law are essentially the same around the world,”75 to confirm that “principles of rationality and proportionality are universal in space as well as in time.”76

The book then is designed to prove the accuracy of these propositions on both an empirical and a normative level. Empirically, in Chapter Two Beatty reviews Canadian division of powers constitutional provisions and doctrine to identify patterns of judicial reasoning that can be re-envisioned as somewhat inchoate, but certainly identifiable, articulations of the proportionality and rationality principles. Particular attention is focused on the mutual modification rule.77 In Chapter Three he argues that the Charter also reflects these principles and that the Supreme Court recognized them in its landmark decision of Oakes.78 More ambitiously still, in Chapter Four, Beatty embarks on a tour of the constitutions and doctrine of a variety of jurisdictions to uncover the transcultural pervasiveness of the constitutional principles. In American jurisprudence he analyses the strict scrutiny doctrine;79 in India it is the constitutional

74. Ibid. at 103-104.
75. Ibid. at 10.
76. Ibid. at 104.
77. Ibid. at 27-30.
78. Oakes, supra note 39.

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discourse of arbitrariness, reasonableness and fairness; in Japan it is the criteria of strict reasonableness and necessity; in the European Court of Human Rights it is necessity and a European standard; and finally, in Germany it is the Rechtsstaat principle through which the “Court has shown its willingness to intervene in almost every aspect of community life and to invalidate any law that is arbitrary, excessive, or imbalanced.” For Beatty, this “comparative jurisprudence ... gives law and these legal principles a measure of objectivity and neutrality that transcends national borders and different cultures and environments.”

To be clear, Beatty does not argue that in all these areas of study every judicial decision has descriptively engaged in, or relied upon, a mode of analysis that incorporates the principles of rationality and proportionality. Indeed, to the contrary, he is candid that in a large number, even in the majority of the cases he has reviewed, these principles have not been adopted. In this regard he has developed his normative argument: it is precisely because the principles were not applied that these decisions are constitutionally incorrect insofar as they have been contaminated by non-constitutional variables. Thus, in the context of Canadian federalism, he is highly critical of the provincial orientation of Lord Haldane and the centralism of Bora Laskin. Similarly, he argues that although the Supreme Court got it right in Oakes, from about 1985 to the present, judges have been insufficiently aggressive in promoting these principles through the Charter. Finally, in his comparative study he

80. Ibid. at 114.
81. Ibid. at 122.
82. Ibid. at 134.
83. Ibid. at 136.
84. Ibid. at 128.
85. Ibid. at 131. This is not Beatty’s first attraction to German modes of social interaction. In Putting the Charter to Work (Kingston: McGill-Queen’s University Press, 1987) he was most impressed with the German system of labour relations as discussed at 147-155.
86. Theory and Practice, supra note 4 at 105.
87. Ibid. at 126.
88. Ibid. at 60.
89. Oakes, supra note 39.
is highly critical of the deference many courts demonstrate to the political regimes in their own jurisdictions. His point is that the principles of proportionality and rationality could indeed provide the appropriate framework of constitutional analysis, if only the judges had the wisdom to use them\textsuperscript{90} and to use them as Beatty proposes.

Although Beatty is discouraged by his empirical findings, he refuses to counsel despair. In his last chapter, he reasserts the potential of his principles to maximize human autonomy and he encourages human rights activists to continue the struggle in the courts to force the judiciary to be faithful to the supremacy of the constitution. Specifically, he suggests that only lawyers who manifest a commitment to the principles of rationality and proportionality should be appointed to the bench.\textsuperscript{91} In sum, for Beatty, the constitution is willing, it is only the spirit of the judges that is weak.

\textbf{B. The Thesis Criticized}

\textit{Constitutional Law in Theory and Practice} is an engaging and provocative justification for a regime of judicially enforceable rights. In its ambition to develop a constitutional super-theory, the book makes bold arguments that merit careful consideration by anyone who worries about the relationship between law, politics and justice. Despite its virtues, the book is marred by several methodological and substantive problems.

\textsuperscript{90} Theory and Practice, supra note 4 at 17.
\textsuperscript{91} Ibid. at 60.
(i) Methodological Problems

Let me begin with two stylistic concerns. Beatty tells us that his primary audience is students who are approaching constitutional law for the first time. Throughout the book he adopts the habit of claiming that “[m]ost students see quite quickly . . .,”92 “most of my students come to see that . . .,”93 “few students take issue with . . .”94 some aspect of his analysis. I have two problems here. First, this is an example of lectern empiricism. Beatty’s reliance upon such a strategy does nothing to advance his core thesis and distracts the reader by invoking the pseudo-legitimizing authority of hypothetical students. Second, and more problematically, the reader must wonder about those students who do not agree, or who take issue with Beatty’s adamantly correct interpretation of constitutional law — what is their constitutional law fate? In short, there is a tone of the oracular in the book with the implication that if the student/reader doesn’t understand and agree, then they have missed their constitutional salvation.

Furthermore, Beatty’s quest for the holy grail of apolitical decision-making entails journeys into fairly fantastic domains. For example, as he embarks on his comparative voyage, he asserts that the ideals of “equality, justice and, personal autonomy”95 are timeless96 and that his two principles of rationality and proportionality are “universal in space as well as in time.”97 In their best light, such claims can only be seen as unguarded hyperbole; in their worst light, they represent ahistorical ethnocentrism. Even the most superficial familiarity with the history of intellectual thought indicates that conceptions of justice and equality shift with time, place and culture.

92. Ibid. at 152.
93. Ibid. at 13.
94. Ibid. at 103.
95. Ibid.
96. Ibid.
97. Ibid. at 104.
Beyond these stylistic concerns there may also be more serious problems of method. For example, in his second chapter Beatty addresses Canadian federalism and the division of powers. This chapter is pervaded by a sense of doctrinal presentism in that prior to the 1980s there was a bias towards either centralism or provincialism, but in the last 15 years the Supreme Court has struck the appropriate balance. For Beatty, this is a happy conjuncture because contemporary doctrine fits with his principles and reinforces co-operative federalism at the same time. The problem here is that Beatty fails to interrogate the virtues and possible limitations of co-operative federalism and, more importantly, its generative forces. Co-operative federalism as a political configuration may or may not be appropriate for late twentieth century Canada, but the point is that it is a contingent constitutional configuration determined by a host of social, political and economic forces. Could it not be argued that given a different alignment of determinants, an alternative constitutional regime from that of Beatty’s principles might well be desirable? However, this sort of reflection is beyond the scope of Beatty’s analysis because his exclusive focus is on constitutional documents and judicial decisions. He pays little attention to the formative contexts that circumscribe constitutional discourse. Consequently, Beatty’s attacks on misconceived provincialism and centralism may be too hasty for he pays insufficient attention to the broader terrain in which constitutional modelling takes place.

These concerns about the somewhat ahistorical and decontextual weaknesses of his method of analysis are intensified by the fourth chapter: the comparative study. As we have seen, Beatty makes large claims in this regard: that the principles of proportionality and rationality transcend time and space. But the only proof he invokes is a review of six constitutions and the dicta of several supreme courts. There is a significant body of comparative scholarship that challenges these claims.

which vehemently argues that the mere comparison of constitutional or legal texts will provide little genuine insight into other legal cultures. Therefore, it may be argued that Beatty’s method of comparative scholarship is extremely elementary. Even if we were to overlook this problem, Beatty admits that while traces of his principles are to be found in the various constitutional regimes which he analyzes, their influence is small. However, he makes no serious attempt to understand why this might be so. Perhaps it is because his principles do not carry as much constitutional resonance for those who operate in a different jurisprudential psyche and milieu. Rather than investigating such a possibility — a possibility that would threaten to undermine the universality and objectivity so crucial to his project — Beatty accuses the ‘infidels’ of irresponsibility, bias and abdication of duty.

Another methodological problem is that Beatty fails to address contradictions between what he is saying in different parts of the book. On occasion, he states that due to the inevitable indeterminacy of constitutional documents, the text really does not matter that much because behind and beyond the constitutional phrases there is always and already the inner logic of his two principles. Indeed, he is critical of the detail of India’s constitution because it can interfere with the discovery of the real principles. At other

100. Theory and Practice, supra note 4 at 109.
101. Ibid. at 145.
102. Ibid. at 126.
103. Ibid. at 110.
104. Ibid. at 38-39.
105. Ibid. at 121, 143. Indeed, I get the impression that Beatty would be most happy with a constitution that had only two sections:

1. The Constitution is supreme.
2. All government acts must accord with the justificatory principles of proportionality and rationality.
points, however, Beatty puts a great deal of emphasis on constitutional texts. For example, he is extremely critical of recent Supreme Court decisions that have limited the scope of the Charter, arguing that there is nothing in the text to support such an interpretive strategy. Statements such as these reveal an assumption that constitutional supremacy requires textual fidelity. But if the text does not really matter, as he suggests elsewhere, how is this possible?

Beatty’s solution to this problem not only compounds the contradiction, it suggests yet another methodological problem: anthropomorphism. In order to advance his proposition that all constitutions are designed to regiment excessive state power, he proclaims that constitutions demand and instruct judges to adopt a large, liberal and purposive approach. However, Beatty provides no specific reference to a particular section in support of this claim. Nor could he because it is not the constitution which is the actor here. A constitution is just a collection of words and conventions. A constitution does not demand or instruct — it is interpreted. A constitution has no agency — it is a terrain of discursive struggle. Like it or not, in a constitutional regime that adopts the practice of judicial review, constitutional supremacy will inevitably lapse into judicial supremacy because, as Beatty himself admits, texts are indeterminate and judges are the guardians. A large, liberal and purposive interpretive ideology, like the principles of rationality and proportionality, is not pregnant within a constitution. It is a gloss which flesh and blood people like Beatty attempt to ascribe to a text. Anthropomorphism in the service of a covert ideological position is a strategy of avoidance, not persuasion.

A cognate problem is Beatty’s employment of definitional essentialism whereby he avoids substantive engagement through the pretense that a concept or practice has one, and only one, meaning and that this meaning is inherent in the concept. An example of this

106. Ibid. at 87, 91, 95.
107. Ibid. at 88.
108. Ibid. at 89.
109. Ibid. at 95.

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occurs in Beatty’s discussion of Andrews.110 In the course of his criticism of the Supreme Court’s focus on historically disadvantaged groups, he asserts that the judges demonstrate “a deeply flawed understanding of what equality really means.”111 He then proceeds to set them straight by rearticulating a version of the ‘similarly situated’ test. I will come back to a substantive discussion of his conception of equality later, but my point here is that equality does not really mean anything. It is one of those essentially contested concepts112 that have been advanced, rethought and reconfigured in different politico-juridical contexts. Equality, in other words, is a prism through which people struggle to articulate a particular social vision and as such is hospitable to a plurality of constructions, each of which is infused with certain background assumptions. Beatty is certainly entitled to argue for the virtues of a similarly situated conception of equality, but that is very different from criticizing the Court for getting it wrong on the basis of some putative inherent meaning.

Finally, there is the methodological problem of slippage. It is obvious that Beatty puts great store in his two principles. However, a close reading of the text suggests that his conception of their pedigree is highly variable. On occasion, he seems to suggest that they are merely “formal, abstract rules of logic and practical reasoning.”113 On other occasions, he suggests that they have much greater normative weight as “general standards of justice”114 and “universal duties.”115 For example, he appears to believe that, if properly applied, his principles might enable a court to identify a “list of policy

110. Andrews, supra note 35.
111. Theory and Practice, supra note 4 at 93. A similar strategy is involved when he proposes that American judges, despite the lack of textual support in the Constitution, have recognized that affirmative action is “inherent in the concept of equality.” Ibid. at 143.
112. See W. Gallie, “Essentially Contested Concepts” (1956) 77 Proceedings of the Aristotelian Society 167, for a discussion of the phenomenon of competing definitions for important societal concepts such as “work of art” or “democracy”.
113. Theory and Practice, supra note 4 at 101. See also Beatty’s discussion of the inherently subjective application of these abstract principles by the judiciary at 146.
114. Ibid. at 104.
115. Ibid. at 142.
objectives . . . that are beyond the constitutional competence of any lawmaker or administrator to translate into law.\textsuperscript{116} At still other points in his argument, he struggles to articulate some intermediate position, claiming that their pedigree is essentially ‘methodological’\textsuperscript{117} in that they allow:

. . . the legislative and executive branches virtually unfettered discretion in the social objectives that they may pursue . . . (so long as) no one’s freedom to live life as he or she sees fit will be interfered with gratuitously or in a way that is out of proportion with how others with similar interests have been treated.\textsuperscript{118}

Once again, Beatty could have taken greater care in specifying more precisely what his principles are designed to achieve.

But a prior question is: what is it about proportionality and rationality that constitutes them as \textit{principles}? Beatty’s repeated emphasis on their principled nature is designed to render them neutral and apolitical and therefore distinct from policy preferences, arbitrariness or subjective value. However, Beatty never discusses the relevant criteria that might be used to determine if something qualifies as a principle. I believe Beatty’s interpretation of the empirical evidence when he argues that it is possible to identify concepts and criteria in constitutional doctrine, both at home and abroad, that dovetail to some extent with what he calls rationality and proportionality. But empirical echoes doth not a principle make. It seems to me that rationality and proportionality, and their cognate terms, are simply two of the choices available within rhetorical discourse that can be invoked in the ‘thrust and parry’ of constitutional engagement. If such a characterization is feasible, then the pedigree of Beatty’s so-called principles is in no way distinct from doctrines such as deference, political questions, etc. which Beatty portrays as policy arguments.\textsuperscript{119} To simply characterize something as a princi-

\begin{quote}
\textsuperscript{116} Ibid. at 110.
\textsuperscript{117} Ibid. at 152.
\textsuperscript{118} Ibid. at 160.
\textsuperscript{119} Ibid. at 124-125.
\end{quote}

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ple will not do. The argument why it qualifies as a principle is missing.

Or, to come at the same problem from a slightly different angle by adopting the discourse of Beatty himself, could it not be argued that the inner logic of Canada’s constitutional order demands a strong separation of powers and that constitutional fidelity requires that the courts be relatively deferential on principle? Thus, judicial deference rather than being irresponsible,\textsuperscript{120} biased\textsuperscript{121} and an abdication\textsuperscript{122} of the proper constitutional dictate may be quite principled, depending upon one’s underlying constitutional vision.

In short, without some attempt to be more methodologically robust in his understanding of what constitutes a principle, Beatty’s quest for neutral principles seems unattainable.

(ii) Substantive Concerns

Beyond some of the foregoing methodological infelicities, \textit{Constitutional Law in Theory and Practice} also raises several substantive concerns. In particular, I am worried about Beatty’s assumptions regarding the nature of the state, equality, personhood and group identity.

First, in the context of the \textit{Charter}, it is not clear on what basis Beatty is able to imbue \textit{dicta} in \textit{Oakes}\textsuperscript{123} with a talismanic aura. This case is made to do a great deal of work in Beatty’s thesis: first, it is said to articulate relatively uncontestable social values; secondly, the values that are proposed in the case are said to operate as constraints upon judicial discretion.

To elaborate, Beatty focuses on the \textit{dicta} in \textit{Oakes} which suggest that the purpose of the \textit{Charter} is to promote:

\begin{itemize}
  \item \textsuperscript{120} \textit{Ibid.} at 145.
  \item \textsuperscript{121} \textit{Ibid.} at 126.
  \item \textsuperscript{122} \textit{Ibid.} at 110.
  \item \textsuperscript{123} \textit{Oakes, supra} note 39.
\end{itemize}
... respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society.124

While I might agree with Beatty that in the abstract these appear to be desirable social values, they are neither uncontroversial, nor total. For example, some First Nations peoples have articulated a different vision of social relations, one that emphasizes the social virtues of trust, kindness, sharing and strength.125 And when Beatty argues that these broad social values have a strong guiding influence on judicial discretion,126 I think that he underestimates the indeterminacy argument — an argument which, as we have seen, he relies upon elsewhere in the book. For example, what does the ‘inherent dignity of the human person’ mean? Conceivably it could mean everything from freedom from torture to a right to social welfare, though in the last few pages of his book Beatty excludes the latter.127 Or again, what constitutes a person? Are fetuses and corporations included? Beatty’s position on these, as we shall see, is hardly beyond debate. Similarly, ‘social justice’ and ‘equality’ are open to a plethora of interpretations as are conceptions of ‘social and political institutions which enhance participation’.

Perhaps there is no better example of the plasticity of these purposes than the suggestion that Canada respects “cultural and group identity.”128 This purpose is particularly important in that group identification seems to fit rather uncomfortably with Beatty’s primary premise that constitutions are driven by an ambition to restrain the state so as to maximize individual autonomy. Indeed

124. Ibid. at 136.
127. Ibid. at 158-159.
throughout the book, Beatty tends to play down the importance of collective rights. They usually only appear in parentheses or as an afterthought.\(^{129}\) Nowhere does Beatty explicitly address the possibility that sometimes individual autonomy may conflict with “cultural and group identity” which, he states, are both primary Charter purposes.\(^{130}\) For example, consider the Quebec Protestant School Board case\(^{131}\) where aspects of the language provisions of Quebec’s Bill 101\(^{132}\) were invalidated. Beatty discusses the case as an example of the Supreme Court striking down legislation on the basis that its ends are not justified under the proportionality principle. Uncharacteristically, he is not particularly critical of this decision.\(^{133}\)

Beatty seems to assume that language rights are individual rights and that the Supreme Court legitimately invalidated this law in order to protect the rights of anglophone individuals who sought education in their own language. However, language can also be conceived of as a group right\(^{134}\) essential to the preservation of cultural identity which is, according to Oakes,\(^{135}\) an important Charter purpose. Beatty fails to address the possibility that these are incompatible constitutional visions that require substantive choices be made by those who judge. In short, I would suggest that the purposes identified in Oakes do little to effectively constrain judicial opportunities. Indeed, an argument could be made that such dicta expand rather than contract the domain of indeterminacy.\(^{136}\)

A second substantive concern relates to Beatty’s implicit ontology. Beatty is adamant that his two principles are neutral and ob-

\(^{129}\) Theory and Practice, supra note 4 at 15, 96, 101, 104, 160-161.
\(^{130}\) Ibid. at 62, 66.
\(^{133}\) Theory and Practice, supra note 4 at 72.
\(^{135}\) Oakes, supra note 39.
jective. But it seems to me that he overstates his case. Beatty’s claim is that the purpose of the constitution is to put restrictions on state power in order to maximize human freedom.\(^{137}\) Thus, as we have seen, he is highly critical of Japanese judges for their deference to the public interest as articulated by representative government.\(^{138}\) Indeed, he goes so far as to argue that they are biased, irresponsible and unprincipled. But respect for the public interest may be premised on a different set of assumptions about personhood and self than those which underlie Beatty’s work. In other words, the difference between Beatty and some of those whom he criticizes is not that his position is principled and theirs is not, but that his is premised upon an individualistic ontology which envisions the self as prior to the community whereas others may see the self as constituted by the community.\(^{139}\) Thus, a constitution premised upon a communitarian ontology may not have as its inherent purpose the shackling of state power, but rather the facilitation of certain communal norms which can best be attained through a pattern of judicial deference to the representative will.

Beatty’s problem in this regard is that he has built into his constitutional vision an ontological premise that is not just substantively loaded but that is also unargued for. It is this assumption that underpins his apparent belief that the promotion of hate literature, pornography and even killing are \textit{prima facie} protected rights under s. 2(b).\(^{140}\) Despite his suggestion that the focus of his theory is not on individual rights, but the obligations and duties of the state, his starting point remains the classical liberal shibboleth of individual liberty. Again, my point is not so much to dispute the attractiveness

\begin{footnotes}
137. \textit{Theory and Practice, supra} note 4 at 95.
139. See generally "Politics of Recognition", \textit{supra} note 134.
140. \textit{Theory and Practice, supra} note 4 at 90. He does acknowledge that they may be limited by the proportionality and rationality principles as filtered through s. 1. However, he provides little discussion of these contentious issues or, for example, the harm principle which is itself flexible in its meaning and contestable in its scope. \textit{Charter, supra} note 1.
\end{footnotes}
and merit of such a vision, but rather to simply highlight that this is not a value-neutral ontological assumption.

However, on other occasions he appears to abandon, or at least radically modify, his prioritization of the individual and his assertion that his principles are universal. Consider for example the following discussion:

Everyone is agreed on what principles control the outcome of the case and what the content of those rules are. The divergences occur because of different perceptions that judges may take of the relevant factual (evidentiary) material and the legal and cultural background against which the principles are applied. The importance of tranquillity and civility in Japanese society, or of foetal life in the Irish Republic, for example, may justify laws restricting street demonstrations and door-to-door canvassing in Japan and abortions in Ireland, even though they might be struck down in other societies, such as Canada and Denmark, where these interests and activities have been valued quite differently.¹⁴¹

Who does the valuing in a society such as the Republic of Ireland? Also, whose values get counted in Beatty’s constitutional calculus? The answer I would suggest is the Catholic moral majority which, historically, has shown little respect for women’s equality rights. In effect Beatty, in a concrete application of his principles, seems to abandon Irish women to Ireland’s cultural background at the very moment when one would have thought that his principles might have done some good work.¹⁴²

The foregoing concerns about Beatty’s (selective) commitment to an individualistic ontology also raise questions about his conception of both the state and equality. The overall structure and tone of the book suggests that he sees the state in a basically negative light. Its agents are always latently threatening. But it may be that in certain forms and practices, state agents are potentially empowering; that their primary role is to enhance equality rather than infringe liberty. More generally, could it not be argued that the ‘inner morality’ of the Canadian Constitution is to promote equality rather than liberty? Such an interpretation has been advanced by

¹⁴¹. Theory and Practice, supra note 4 at 145 [emphasis added].
¹⁴². Ibid. at 101.
many Canadian feminists and seems to have been of interest to the Supreme Court.\textsuperscript{143}

Beatty appears to disagree. Consider, for example, some of the cases he seems to applaud. In the American context he appears to endorse cases such as \textit{Lochner v. New York},\textsuperscript{144} \textit{Buckley v. Valeo}\textsuperscript{145} and \textit{Regents of University of California v. Bakke}\textsuperscript{146} as they demonstrate the courts in their most bullish\textsuperscript{147} moments, striking down redistributive policies "that are beyond the constitutional competence of any lawmaker or administrator to translate into law."\textsuperscript{148}

Similarly, he appears to be delighted with the fact that German courts have struck down legislation regarding, for example, rent control and consumer protection\textsuperscript{149} thereby enhancing the rights of property owners and commercial enterprises against tenants and consumers.

In sharp contrast to his apparent antipathy for the state and public power, Beatty appears to have an excessively benign opinion of private power, particularly that of corporations. He seems undisturbed by the fact that in cases like \textit{Big M Drug Mart}\textsuperscript{150} corporations benefitted from freedom of religion arguments.\textsuperscript{151} He is also highly critical of judicial deference to legislative regulation in both \textit{Edwards Books}\textsuperscript{152} and \textit{Irwin Toy}\textsuperscript{153} because they are excessive in their re-

\textsuperscript{143} For a discussion of this argument see "Anglophone Legal Theory", \textit{supra} note 3.
\textsuperscript{144} 198 U.S. 45 (1905).
\textsuperscript{145} 424 U.S. 1 (1976).
\textsuperscript{146} 438 U.S. 265 (1978).
\textsuperscript{147} \textit{Theory and Practice, supra} note 4 at 110.
\textsuperscript{148} \textit{Ibid} at 110. Beatty's position on the American Supreme Court is somewhat ambiguous. While it is clear that he is opposed to judicial deference, \textit{ibid}. at 110-111, it is not clear whether he prefers strict scrutiny, \textit{ibid}. at 109-110, or the "middle ground" of intermediate scrutiny, \textit{ibid}. at 111-112.
\textsuperscript{149} \textit{Ibid}. at 131.
\textsuperscript{150} \textit{Big M, supra} note 39.
\textsuperscript{151} \textit{Theory and Practice, supra} note 4 at 68.
restraint of corporate autonomy. Moreover, he seems to favour robust constitutional protection for commercial expression and even advocates in favour of corporate access to s. 7 rights.

To me this suggests a rather unbalanced and even decontextual understanding of the relations of power and inequality in Canadian society. Threats to the integrity and autonomy of the individual are undoubtedly very real in Canadian society. But they are not necessarily only traceable to public state power. Private power, though perhaps less ‘in your face’ is just as threatening — indeed, private power may be considered more threatening by reason of its invisibility. But Beatty’s theory implies that state power is prima facie malignant whereas corporate power is presumptively benign. Neither position is warranted. Power, both public and private, is politically ambiguous. Judgments about its exercise need to be made in context, free from the ideological imbalance built into a public/private dichotomy. Moreover, power is relational. As such, power is channelled and circumscribed by a host of material, institutional and ideological forces. Consequently, state power can intersect and dovetail with private power in a multiplicity of ways, sometimes reinforcing it, sometimes challenging it. In short, because he relies upon an insufficiently complex conception of power, Beatty’s constitutional vision is premised on a rather conventional (perhaps Hobbesian) understanding of social and political arrangements that is, once again, neither neutral nor even empowering for human autonomy.

Currently, there exists a fairly rich philosophical literature that suggests two traditions within liberalism: classical liberalism and egalitarian liberalism. The former prioritize liberty and understand equality as either formal equality or equality of opportunity. The latter prioritize equality and allow for significant restraints on liberty in the pursuit of enhanced substantive social equality. The foregoing discussion suggests that Beatty subscribes to the classical liberal

154. Theory and Practice, supra note 4 at 83.
155. Ibid. at 111-112.
156. Ibid. at 79. See supra note 1 at s. 7.
157. See e.g. Dyzenhaus, supra note 50.
view. This is confirmed when we analyze how Beatty conceives of
group claims and, in particular, his thoughts on the position of
women and aboriginal people in the constitutional order.

As mentioned, Beatty puts great store in the Oakes\textsuperscript{158} case. Despite
the fact that the Supreme Court explicitly targeted group identity
in its catalogue of Charter purposes, group rights are usually men-
tioned only in passing in Beatty's work.\textsuperscript{159} As I have pointed out,
Beatty does not really adequately address the possibility that there
may be conflict between individual and group rights. This claim is
reinforced when we analyze women's rights in Beatty's scheme of
things. In general, it can be said that women do not feature promi-
nently in Beatty's discussion. Usually they are only mentioned in
passing.\textsuperscript{160} On occasion they are even rendered constitutionally
invisible. For example, in discussing prostitution, Beatty's primary
concern seems to be with defending the province's interest in regulat-
ing the quality of life in its neighbourhoods and on its streets.\textsuperscript{161}
Furthermore, the concern that women's equality rights are subor-
dinate to the liberty principle is implied by the fact that Beatty
seems pleased that the Supreme Court struck down the rape shield
provisions in Seaboyer\textsuperscript{162} and sexual offences laws in Hess.\textsuperscript{163} In con-

\begin{itemize}
\item 158. Oakes, \textit{supra} at note 39.
\item 159. \textit{Theory and Practice}, \textit{supra} note 4 at 15, 96, 101, 104, 160-161.
\item 160. \textit{Ibid.} at 65, 112, 131. Some readers may think it a little unfair to criticize an
author for failing to discuss a particular issue, in this case the group rights of
women and aboriginal peoples. In reply I would simply suggest two points. First, Beatty's
failure to seriously discuss group rights is an internal flaw because it indicates that
his is a selective reading of the \textit{Oakes} case. Second, the constitutional status of
women and First Nations peoples are two of the most pressing concerns for con-
temporary Canadian constitutional law and potentially two of the most challenging
areas for Beatty's thesis. It is curious that a theory as ambitious as his would shy
away from such obvious concerns.
\item 161. \textit{Ibid.} at 56.
These cases are a particularly good example of how constitutional norms can be at
odds and the only way to resolve the contradiction is to make a choice, a choice that
is not neutral but unavoidably ideological.
\end{itemize}

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trast, he appears to be somewhat critical of the Butler decision because the court showed too much deference to the legislature. Finally, there is Beatty’s position on abortion. As we have seen, Beatty appears to believe that the prohibition on abortion in Ireland is constitutionally justified. However, he seems to support the Morgentaler decision on the basis that women “gained more control over their bodies.” This, however, echoes the liberty and privacy understanding of access to abortion — a viewpoint which egalitarian feminists argue is of only limited utility to many women because it does not impose an obligation on the state to provide abortion facilities on the basis of equal access to health care. Even in this regard, there is ambiguity in Beatty’s position because, later in the book, he is uncharacteristically descriptive of the German Constitutional Court’s 1975 abortion decision where the court took positive steps to criminalize abortion on the basis of a right to life argument.

Aboriginal groups and their rights seem to be even more marginal in Beatty’s constitutional vision. On occasion, there is a passing reference to discrimination under the Indian Act and even an extremely ambiguous reference to small communities controlling their own destinies. However, in the main, First Nations peoples are ignored by Beatty. Consider again Beatty’s conception of the federal principle: it ensures that “sovereign power is divided in Canada between two ‘equal and co-ordinate’ orders of government” the effect of which is to “prevent either level from being subordinated and dominated by the other.”

165. Theory and Practice, supra note 4 at 83-84.
168. See e.g. Lessard, supra note 49.
169. Theory and Practice, supra note 4 at 132-133. It is worth noting that although Beatty acknowledges in a footnote a 1993 decision there is no substantive discussion of this later abortion case which modifies the earlier decision in quite significant ways. Judgment of May 28th 1993, BVerfG, 88 BVerfGE 203.
171. Theory and Practice, supra note 4 at 100.
172. Ibid. at 26. See also page 61.
Beatty's constitutional analysis starts in 1867 and therefore ignores crucial constitutional concerns that predate this moment. Thus, there is no reference to the prerogative treaties or the Royal Proclamation of 1763 which are constitutional documents that many First Nations peoples and even members of the Supreme Court believe to be of vital importance. Moreover, these documents raise crucial questions about the rights of peoples which appear to fit quite uncomfortably within Beatty's constitutional order, grand though it may be.

In sum, one of the most remarkable things about Constitutional Law in Theory and Practice is the certitude with which Beatty advances his core argument: that the principles of proportionality and rationality can provide neutral and universal parameters for constitutional decision-making that are sufficiently determinative to curtail judicial megalomania. The optimism manifests itself in a multitude of ways: in the suggestion that the constitutional text means very little; in the argument that although the Supreme Court of Canada has been "erratic and inconsistent" in recognizing and adopting his principles in the federalism context, "over time the courts are . . . getting better at the job"; in the belief, that despite the fact that in the Charter context the courts' approach has been unimpressive and the resultant protection of human rights "ambiguous at best," the courts should still be relied upon; in the proposition that, in spite of themselves, courts everywhere subscribe to the two principles; and in the conception of reform which

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174. See e.g. Henderson, supra note 6.
176. Theory and Practice, supra note 4 at 50.
177. Ibid. at 54.
178. Ibid. at 74-84, 106.
179. Ibid. at 106.
180. Ibid. at 99.

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suggests that all that is required is a personnel change.\footnote{181} Beatty’s optimism leads him to conclude that “fortunately . . . both the integrity of law and the efficacy of the courts are still within our power to control.”\footnote{182} But who is this \textit{we} and how are we to effectively control a wilful judiciary? Given the record of the courts, as it has been presented to us by Beatty, why should we have confidence? In short, Beatty’s argument is a call for faith\footnote{183} in the possibility of perfectionism. But if I refuse to take the leap it is not because my choice is wrong in some constitutional sense, it is because to my agnostic mind, history is a better predictor of the future than prophetic pronouncements.

\section*{III. Hutchinson’s Groundless Theory}

\subsection*{A. The Argument Described}

If Beatty’s conception of constitutional law and judicial review is strikingly \textit{jejune}, Hutchinson’s is decidedly jaundiced. As the subtitle of \textit{Waiting for Cora}\footnote{184} makes clear, it is an exercise in critique rather than refurbishment. While Beatty believes in universal principles which can lay a solid foundation for autonomous legal decision-making, Hutchinson’s commitment is to antifoundationalism. This is the epistemological proposition that there is no prepolitical or transcendental location from which we can claim legitimacy based on neutrality.\footnote{185} His argument is that because there are no independent grounds for legal or political decision-making, we need to seek legitimacy for our practices and institutional arrangements in a new and hitherto unexplored way. Constitutional law, in his view, is driven by certain historically spe-
cific ideological preferences\(^{186}\) and judicial review is an illegitimate
exercise of power because structurally and discursively it is elitist
and unaccountable.\(^{187}\) Democracy rather than liberty is
Hutchinson’s ‘lode star’.

Hutchinson breaks his analysis into three parts. Chapter One out-
lines some fairly large claims. Chapters Two to Five constitute a
critique of contemporary Canadian constitutional law and legal
theory. And Chapters Six to Eight tentatively map out an alterna-
tive path which decentres both law and judicial review in favour of
an invigorated democratic politics.

Hutchinson structures his argument as an allegory to Samuel
Beckett’s existentialist classic, \textit{Waiting For Godot},\(^{188}\) in which
Vladimir and Estragon wait endlessly and pointlessly for the ever
absent Godot. Hutchinson argues that most Canadian lawyers and
jurists await the coming of CORAF (The Charter of Rights and
Freedoms) in the same way, believing that eventually liberal legalism
will guarantee social justice. However, this is a false hope, a tragic
farce,\(^{189}\) because liberal legalism has underlying assumptions and
commitments which make it constitutively incapable of facilitating
the social transformations that are required to achieve a more just
society. Specifically, Hutchinson proposes that the Charter, as
liberal legalism’s ‘crowning jewel’, is an especially nefarious barrier
to the pursuit of social justice for several reasons:

\begin{itemize}
  \item it prioritizes individual liberty at the expense of the social good;
  \item it fetishes the rhetoric of rights at the expense of a discourse of
        responsibility;
  \item it is dependent upon the invocation of a public/private
dichotomy that insulates private power while undermining the
        possibilities of progressive public power;
\end{itemize}

\(^{186}\) \textit{Ibid.} at 24.
\(^{187}\) \textit{Ibid.} at 22.
\(^{189}\) \textit{Coraf}, supra note 5 at 228.
• institutionally, it confers far too much power on an unrepresentative and unaccountable elite whose identity, training and experiences render them unsuited to the pursuit of substantive social equality; and
• rights discourse is deeply indeterminate and therefore incapable of bearing the weight that Charter advocates would impose upon it.

In order to terminate this farce and bring us back to reality, Hutchinson attempts to construct an alternative postmodern drama. This play, this poetic exercise, does not ascribe to Canadians the role of mere spectators. Rather, it brings us all onto the enlarged stage of a reconstructed state and gives us the opportunity to script our own lines and lives as authors and empowered citizens: it is a radical participatory democracy premised upon and committed to a dialogic ethos. In turn, this generates an expansive conception of a constitution as something larger than, and quite distinct from, historical documents and formal institutions:

A constitution is an organic process through which states determine the kind of society and citizens that they are and can become. It embraces the dynamic efforts of people to negotiate and establish the institutional and substantive terms of their collective existence . . . It is not a one-time event or a purely practical act of political will. It is an enduring moment and continuing occasion through which societies, sometimes as much by default as design, constitute themselves and define the temporary circumstances and transitory possibilities of their existence. While the formal documents and conventions of nationhood represent a privileged resolution of constitutional debate, each attempt to interpret and reinter pret that compromise gives fresh meaning and effect to it. At the same time, the efforts of workers and the poor to achieve better social programs and a fairer distribution of wealth should also be counted as constitutional expressions. Thus constitutionalism embraces the practical and the utopian, the institutional and the ideological, the real and the imagined, the past and the future. It is the heart of politics ...

190. Ibid. at 25.
191. Ibid. at 26.
192. Ibid. at 228-229.
193. Ibid. at xiii.
194. Ibid. at 23.
In sum, for Hutchinson, the fact that we find ourselves without determinate foundational truths should not be a cause for panic or despair. To the contrary, groundlessness can free us from the myth of necessitarianism — the conflation of the actual with the inevitable. By clearing this space, antifoundationalism can provide us not just with the opportunity, but also with the responsibility to pursue a more just and egalitarian social order.  

In Chapter Two, Hutchinson develops his central deconstructive move: the argument that rights talk is indeterminate. The reason why this is crucial is obvious from the preceding discussion of Beatty. Conventional wisdom, “Corafianism” in Hutchinson’s terms, is premised upon two assumptions: a) the belief that rights concretize transhistorical principles that are substantively neutral with regard to citizens’ conceptions of the good, because their function is simply to ensure that each person’s autonomy is untouched so long as it does not harm another; and b) that in moments of contestation rights are specific enough to provide judges with determinative correct answers that inhibit them from imposing their own politicized conception of the good. Hutchinson launches a five-pronged argument to demonstrate that these assumptions are indefensible. He claims:

There is no neutral standpoint from which to identify who are to be the recipients of such rights . . .
There is no non-political way of arriving at what particular group of rights are to be recognized and enforced . . .
There is no uncontroversial means of determining the scope and nature of each particular right . . .
There is no method internal to the theory of rights that can be used to adjudicate upon the clash of competing rights . . .
The recognition that rights are fundamental, but not absolute, gives rise to the difficulty of balancing the public interest against the individuals’ claims.  

195. Ibid. at 164.
196. Ibid. at 22.
197. Ibid. at 29.
In Chapter Three, Hutchinson moves from his deconstruction of *Charter* doctrine and rights discourse to a critique of Beatty and Conklin. In his opinion, these scholars seek to defend that which he has demonstrated to be indefensible. His basic thesis is that these “Corafians” subscribe to a formalism that attempts to repress rather than acknowledge that it is ideology which inevitably drives all forms of decision-making including judicial review. Objectivity is impossible because interpretation is contingent on the “identities and interests of the interpreters” and so the Rule of Law is inescapably and undemocratically the rule of lawyers. Rationalization rather than reason is the hallmark of law talk.

Although Hutchinson believes that rights discourse is indeterminate and cannot be salvaged for the tasks of liberal legalism, he is quick to point out that indeterminacy should not be confused with normative neutrality. Thus in Chapters Four and Five, via discussions of poverty, abortion and liberalism’s conception of the state, he identifies three particularly significant problems with rights discourse: a) its proclivity for individualism; b) its tendency for abstraction; and c) its reliance upon an incoherent public/private dichotomy. Hutchinson claims that the re-encoding of public social problems as a question of private legal rights means that the specificities of unequal power relations are ignored and the possibility of structural reorganization is presumptively excluded. The result is that rather than being empowered by rights discourse, women and poor people are marginalized and even rendered juridically invisible. Hutchinson suggests that a better, post-liberal approach to the problems of abortion and poverty would focus more on social needs and communal solidarity; reconceive the nature of the contemporary state; and strive to enhance the space for choices that are genuine rather than structurally coerced. In particular, the com-

mitment to “autonomy, participation, and substantive equality.”\textsuperscript{204} will require the corralling of corporate and patriarchal power. Hutchinson claims such changes are not likely to be triggered by the judiciary for they are within the thrall of the classic liberal assumptions. The only hope is active democratic participation.\textsuperscript{205}

In his sixth chapter, before moving to a substantive discussion of his revised constitutional system, Hutchinson addresses the arguments of Langille, Nedelsky and Trakman. They appear to go part way with him, but cannot bring themselves to abandon either rights talk or the practice of judicial review. Once again the charge is formalism,\textsuperscript{206} though dressed up in some form of jurisprudential attire: pragmatism, relationalism or socialism. However, for Hutchinson all these arguments fail to pay sufficient attention to his core credo: judicial empowerment is the antithesis not the apotheosis of an unmodified civic democracy.\textsuperscript{207} As practitioners and enforcers of a “falsely privileged mode of discourse,”\textsuperscript{208} judges are part of the problem, not part of the solution.\textsuperscript{209}

The final two-and-a-half chapters are given over to a tentative mapping of Hutchinson's own preferred constitutional vision, elements of which have been foreshadowed by his critique. His reconstructive project proposes, at a minimum, a two pronged strategy: working within law and working without law.

While Hutchinson is highly critical of law, he is not cynical about it.\textsuperscript{210} His is a position of progressive, responsible and strategic scepticism\textsuperscript{211} and "mindful moderation,"\textsuperscript{212} one which recognizes that law is not going to fade away, but at the same time, one that

\begin{itemize}
  \item 204. \textit{Ibid.} at 153.
  \item 205. \textit{Ibid.} at 153.
  \item 206. \textit{Ibid.} at 155, 168.
  \item 207. \textit{Ibid.} at 168, 173.
  \item 208. \textit{Ibid.} at 171.
  \item 209. \textit{Ibid.} at 168.
  \item 210. \textit{Ibid.} at 173.
  \item 211. \textit{Ibid.} at 158, 173, 175.
  \item 212. \textit{Ibid.} at 177.
\end{itemize}
wants to see law's imperialistic ambitions curtailed. More precisely still, he suggests that law, like the state, is multifaceted and can take various forms some of which are more in line with his democratic project, and some of which are anathema to it. For example, revitalized juries and local justice commissions would support his project while judicial review would undermine it. Indeed, he realizes that in Canada the constitutional die of judicial review has been cast and that “occasional strategic advantage” may be obtained via litigational politics. He illustrates this program of postmodern progressive lawyering through a discussion of R. v. Morgentaler. However, Hutchinson is at pains to emphasize that litigational politics on the basis of rights should only be relied upon in the most dire circumstances for even success can result in deradicalization through partial incorporation. He therefore proposes that legal talents could be put to better use, for example, in the pursuit of legislative reform and enhanced democratic processes. What is to be avoided is the reaction of lawyers who automatically assume that going to court is the only available strategy. Such a reaction reinforces the vicious cycle in which needs are translated into rights that can only be determined by judges who are not only unaccountable but insensitive to the discourse of needs and substantive equality.

So, according to Hutchinson, the primary struggle for progressives is to shrink the sphere of influence of law, rights discourse and an illegitimate judiciary and fill that void with the “untried possibilities of dialogic democracy.” His “general theory of democratic dialogism” is a sophisticated argument that is difficult to condense. Basically, Hutchinson argues that political discourse carries a greater presumption of legitimacy than legal discourse because it is

213. Ibid. at 172.
214. Ibid. at 174.
216. Cora, supra note 5 at 182.
217. Ibid. at 108.
218. Ibid. at 153.
219. Ibid. at 185.
220. Ibid. at 189.
based upon democracy.\textsuperscript{221} Participatory democracy is preferable to representative democracy because it is more immediate in its responsiveness to the citizenry. Participatory democracy is best conceived of as a dialogue between members of the community. Note, however, that for Hutchinson language is not simply a medium, it is always and already a political process that incorporates some important solidaristic norms.\textsuperscript{222} Dialogue, by its nature, is less individualistic and libertarian than rights discourse because it is premised upon intersubjectivity.\textsuperscript{223} By this Hutchinson means that the parties to a conversation are in a relationship of “shared commitments and mutual understandings”\textsuperscript{224} in the pursuit of their ongoing negotiations.\textsuperscript{225} This implies an ethos of solidarity,\textsuperscript{226} equality,\textsuperscript{227} responsibility,\textsuperscript{228} caring and sharing.\textsuperscript{229} Democratic dialogue is structurally less hierarchical and potentially more inclusive than law talk because it is not premised upon the idioms of an elitist caste. Furthermore, Hutchinson suggests that the more citizens participate in democratic discourse, the more they will feel empowered.\textsuperscript{230} In turn, this sense of empowerment reinforces our capacity to rethink the nature of the state: not simply as a set of homogeneous governmental institutions but “as a site and structure for the creation of the exercise of power”\textsuperscript{231} that cannot be captured by some putative public/private dichotomy.

To develop these claims a little more concretely, Hutchinson revisits and recasts the debate around free speech and, in particular, focuses on the dangers of constitutionally entrenching the right of

\textsuperscript{221} Ibid. at 74-75.
\textsuperscript{222} Ibid. at 191.
\textsuperscript{223} Ibid. at 204.
\textsuperscript{224} Ibid. at 197.
\textsuperscript{225} Ibid. at 227.
\textsuperscript{226} Ibid. at 189.
\textsuperscript{227} Ibid. at 212.
\textsuperscript{228} Ibid. at 216.
\textsuperscript{229} Ibid. at 188.
\textsuperscript{230} Ibid. at 216.
\textsuperscript{231} Ibid. at 208.

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commercial speech. The argument appears to be that in Canada the greatest threat to human autonomy and social equality at the end of the twentieth century comes from corporate power not state power: we tend to prioritize our identity as consumers over our identity as citizens.\textsuperscript{232} According to Hutchinson, an empowered democratic polity would take citizenship seriously and would therefore allow for significant legislative and administrative restrictions on corporate expression because it tends to silence other forms of speech. In other words, dialogic democracy focuses less on the right to expression and more on the “interactive conditions”\textsuperscript{233} that can make engaged and egalitarian conversation possible.\textsuperscript{234} Indeed, positive steps could be taken to create discursive space for those who, historically, have been silenced.\textsuperscript{235} Constitutionally entrenched and judicially enforced rights can only serve as a bulwark against such democratic goals and should therefore be discarded.\textsuperscript{236}

Hutchinson concludes the book by calling on us to quit the farce of CORAF. He admits there are no guarantees that we will end up in a better situation. However, he assures us that an empowered democracy rather than judicial supremacy is the “least worst match with the non-foundationalist project.”\textsuperscript{237} In that way, citizens in all their diversity would at least be able to participate in constructing their future rather than, like Estragon and Vladimir, being paralyzed waiting for a salvation that will never come.

\section*{B. The Argument Criticized}

The reader will probably sense that in terms of philosophical disposition, political commitment and jurisprudential affiliation my position is much closer to Hutchinson than to Beatty. However,
Hutchinson’s project is also vitiated by several problems, some quite serious.

(i) Stylistic and Methodological Problems

On occasion Hutchinson’s tendency to lapse into excessive rhetoric can cause him problems both minor and substantive. In relation to the former, he portrays the debate over the Charter and judicial review as a struggle of epic proportions with a comparison to the dispute between “Galileo and the Italian establishment.” More seriously, Hutchinson’s self-confessed “apostolic” zeal can lead him to overstate his case. Consider the claims that “rights talk has had its day,” that “rights talk flatters to deceive” and that he favours “the virtues of democratic dialogue over the vices of rights talk.” The problem here is that this may be a false dichotomy, forcing upon us an either/or position that is neither attractive nor politically feasible. Feminist engagements with rights discourse is enlightening in this regard. For example, in the course of an argument that rights talk has “proved sorely inadequate to the task of ensuring that women are able to take control of their own

238. Ibid. at 20.
239. Ibid.
240. Ibid. at xi.
241. Ibid.
242. Ibid. at xii.
243. Consider, for example, the following:
Where rights-talk is abstract, democratic conversation is engaged; where rights-talk is individualistic, democratic conversation is civic; where rights-talk is legalistic, democratic conversation is popular; where rights-talk is myopic, democratic conversation is visionary; where rights-talk is anemic, democratic conversation is full-blooded; where rights-talk is absolute, democratic conversation is contingent; where rights-talk is exclusionary, democratic conversation is inclusionary; where rights-talk is narrow, democratic conversation is expansive; and where rights-talk is blunt, democratic conversation is nuanced. See ibid. at 216-217.
bodies...”, Hutchinson acknowledges that its “achievements... have been considerable for women in many areas of social life...”244 But there is no attempt to seriously examine why this might be so, or more particularly, how much damage this significant exception might do to his larger argument.

Moreover, as we have seen, he concedes that in a rights-dominated regime it may be necessary to invoke the discourse of rights on the basis that an “occasional strategic advantage”245 might be achieved as, for example, in the Morgentaler situation. The problems here are: a lack of specificity in mapping out the possibilities for such moves and the danger of *post hoc* rationalization. Hutchinson says very little to indicate when it might be appropriate to consider such interventions. The likelihood is that such strategic moves will be cautiously affirmed when they are ‘successful’ from a democratic perspective, but ridiculed if not. But this is unhelpful for those who, when faced with immediate and threatening problems such as pornography or hate literature, have to decide whether to go the rights route or not.246

Indeed, at other points Hutchinson seems to buy into rights discourse even more directly by proposing, for example, that the “regulative ideal of dialogue incorporates both a right to hear, to be heard, and to be answered.”247 In what way does such a “dialogic entitlement”248 really escape the dangers of rights discourse? As presented, this seems to be something more than ‘an occasional strategic advantage’, suggesting some sort of essential juridical presupposition that emanates from his dialogic thesis. Unfortunately, Hutchinson fails to address this apparent contradiction. Thus it

245. *Coraf*, supra note 5 at xiii.
246. Moreover, as one of the anonymous reviewers of this article pointed out, it is curious that Hutchinson in a book published in 1995 which focuses in large part on dialogues and expressions, has so little to say about cases such as *R. v. Keegstra*, [1990] 3 S.C.R. 697; *Butler*, supra note 165; and *R. v. Zundel*, [1992] 2 S.C.R. 731.
247. *Coraf*, supra note 5 at 212 [emphasis added].
seems that perhaps greater attention needs to be focused on the different forms rights might take, for example; legislative versus constitutional, legal versus moral and civic versus juridical. The more nuanced point is that not all rights arguments are inevitably bad; rather, it is that they are always dangerous.249

Finally, there are also several situations when Hutchinson shifts from the critical and normative to the empirical without adequately considering what this might entail methodologically. For example, Hutchinson claims that in the abortion context “law has tended to exacerbate tensions and differences . . .”250 This is a significant claim which depends upon an analysis of the complex relationship between law, politics, gender and social change that, among other approaches, might require some comparative study. Unfortunately, Hutchinson provides no support for such an assertion. Similarly, although he argues that it is desirable for legislatures and administrative agencies to be able to regulate corporate speech,251 he fails to consider the problem of agency capture which has been the bane of much welfarist social policymaking. Again, in a critique of academics who propose a constitutionally protected right to beg, he claims that “[t]hese destitute souls beg not for alms, but for an end to their plight as hapless hostages to capitalist fortune: it is public transformation as much as private charity that they seek.”252 But this proposition is unsupported by any reference to studies that might support such a claim and carries a sense that Hutchinson is projecting his ideological vision onto their consciousness.253

250. Coraf, supra note 5 at 102.
251. Ibid. at 201.
252. Ibid. at 100.
253. Moreover, there is the danger that Hutchinson himself does what on the following page he warns against, and what his dialogic theory more generally is designed to prevent: speaking on behalf of the other. Ibid. at 101.
(ii) Substantive Concerns

Even if Hutchinson were to remedy some of the foregoing stylistic and methodological problems, there remain several substantive issues. My concerns in this regard relate mostly to the incompleteness of some of his arguments and thus their lack of persuasiveness.

One underdeveloped argument relates to Hutchinson's conception of social and political relations after the collapse of the public/private dichotomy. While he rejects the dichotomy on the basis of its tendency to insulate large areas of personal and social interaction from redistributive and regulatory state intervention, he also claims that we should not fear its abandonment because such a step does not mean that everything will become public and he still suggests that there will be a post-liberal conception of “autonomy.”

In support he invokes the abortion debate, but the point is not fully addressed. One might well agree with the argument that women should have control over their bodies and that society requires significant restructuring in order to make their options genuinely uncoerced. But even if these were achievable social goals does this mean that the state has no regulative role in relation to a fetus quite late in a pregnancy? Hutchinson has little to say in this regard. Clearly from the overall argument, he wants it both ways: an expansive state and an enlarged realm of autonomy. I can agree that these should not be assumed to be necessarily antithetical to each other, and indeed that frequently they can be mutually supportive, but this does not deny the possibility that sometimes the state will be a threat to the autonomy of the self. Without the assistance of a public/private discourse how are we to make decisions and justify our reasons? One is left wondering whether Hutchinson really wants to abandon the dichotomy or whether he would simply draw the lines somewhat differently.

I also have concerns about Hutchinson’s proposals with regard to how we might move from rights talk and social inequality to democratic dialogue and social equality. In his quest to divide the

254. Ibid. at 152-153.
world between deluded and apologetic “Corafians” and critical “agents provocateurs,” he portrays Conklin as a “traditional scholar and lodges him in the same camp as Beatty, accusing him of “visionary formalism,” “daydream believing,” “dewy-eyed Corafian[ism],” “nocturnal fantasies” and “outrageous hallucinatory reveries.” I have two problems here.

First, I think that Hutchinson could have demonstrated a little more charity in his interpretation of Conklin’s project. There could be no suggestion that Conklin is either traditional, formalistic or dreamy, if Hutchinson had read him in the light of his other scholarship. To my mind their positions are in fact quite close: they both want a more accountable judiciary. Where they differ relates to their respective assessment of the current politico-juridical context and their targeted audiences. Conklin’s purpose, as I read him, is to encourage judges to be more candid about their images of a constitution in order to render their assumptions — social, political and ontological — much more transparent thereby making them a little more accountable. On this reading, ‘image’ may be just Conklin’s way of articulating in a slightly more palatable manner (for the judiciary) what Hutchinson calls “ideology.” While it is clear that this is not as radical as Hutchinson’s democratic approach, my point is that the difference is more one of strategic assessment and tactical positioning. Hutchinson may be on solid ground if he were to criticize Conklin’s strategic sense of trying to

255. Ibid. at 18.
256. Ibid. at 20.
257. Ibid. at 75.
258. Ibid. at 76.
259. Ibid. at 78.
260. Ibid.
261. Ibid. at 79.
262. Ibid. at 86.
264. Coraf, supra note 5 at 85.

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work from within the dominant ideology as being too optimistic. However, others could argue with equal merit that Hutchinson is too optimistic about the possibilities of empowerment through dialogue, or the tactical wisdom of progressives withdrawing from constitutional litigation in the expectation that "the judicial process might wither away as the leading institutional organ for social policy making."265 This might be naive because non-progressive forces are likely to have even greater recourse to judicial review if the field is unoccupied.

Second, in his challenge to Conklin, Hutchinson argues that images do not drive decision-making, rather it is the "identity and intentions"266 of the judges. But this raises the question of what role ideas play in the world of politics and law. Obviously, Hutchinson must believe that they play some role or his own politico-academic project would be pointless. Indeed, one of the most distinctive characteristics of Hutchinson's own style of advocacy is to draw very heavily on metaphors to persuade his audience. Moreover, within a few pages of trashing Conklin, Hutchinson himself relies upon the discourse of 'visions' to advance his own analysis.267

The concept of identity does a great deal of work in Hutchinson's analysis. Time and again he insists that judges are unsalvageable due to their identity,268 but is there not a danger of sociological essentialism — an excessive reliance on the traditional Marxist aphorism that "social being . . . determines consciousness"?269 While my own position is far from idealist, in the sense that I think that our material and existential contexts undoubtedly circumscribe our ways of knowing the world, I also believe that we have the capacity for self-reflexivity and that our ideologies can change as we encounter new contexts and worldviews. This is something which I think Hutchinson himself would accept given not only his postmodern conception of the self but also his own expressed sympathy for

265. Ibid. at 182.
266. Ibid. at 82.
267. Ibid. at 90-93.
268. Ibid. at 170-171.
those oppressed groups in contemporary Canadian society. However, it is unclear to me why he singles out judges in particular as being especially incapable of ‘changing their spots’. I am not suggesting his basic thesis that judges are unlikely agents for progressive social change is mistaken. However, what I am pointing out is that Hutchinson needs to focus more on the question of the relationship between identity and ideology before he dismisses judicial consciousness-raising as one potential terrain of contestation. A starting point for this might be a discussion of Morgentaler as a study of shifting judicial images, visions or ideologies.

This issue of the relationship between identity, law and politics raises another problem for Hutchinson’s theory. As we know, Hutchinson suggests that progressive lawyering entails the capacity on the part of lawyers to curtail their own professional hubris, to centre their own position and take a more modest and deferential role in political praxis. However, given that lawyers as a group tend to share much of the same identity and ideology as their judicial superiors, what causes Hutchinson to have any hope that they are more likely to surrender privileged positions for some supporting role? Stated more philosophically, what Hutchinson seems to be missing is an account of the factors or circumstances that might psychologically motivate lawyers (but apparently not judges) to embrace the cause of empowered democracy. This is important because the same problem also applies to the second prong of his reconstructive project — the commitment to the regulative ideal of democratic dialogue. What makes Hutchinson think those who currently have power, and who tend to monopolize the channels of communication, would consent to the adoption of dialogic processes that so manifestly undercut their own hegemony?

This problem conveniently leads me to several other concerns that I have with his plans for a dialogic democracy. Although Hutchinson’s dialogic ethos is attractive in that it assumes a basic substratum of commonality that makes social, political and legal coordination plausible, further work needs to be done if it is to be a credible alternative. Although he is quite critical of the false prom-
ises of “rationalism” and “universal principles,” it seems to me that dialogism is premised upon important rationalistic and culturally ambitious assumptions. Consider, for example, Hutchinson’s conception of dialogism as a “regulative ideal.” His claims are large: it “incorporates a right to hear, be heard and to be answered. It establishes and maintains the social conditions for open-ended, continuing and meaningful conversations in which people engage as equals and that it is premised upon “mutual understanding, respect, a willingness to listen and to risk one’s opinions and prejudices, a mutual seeking of the correctness of what was said . . .” Within such a framework politics is envisioned as the ongoing “negotiation of a balanced polity.”

The assumptions underlying this vision seem to be that our differences are essentially substantive and with new and improved solidaristic procedures it will be possible to move towards substantive reform and egalitarian justice. However, there are several problems here. First, and obviously, politics and power are driven as much by bad faith as by good faith and this reality cannot be glossed over as quickly as Hutchinson suggests. Second, even assuming that parties to a politico-juridical dialogue were to operate in good faith, there is the question of what language they are to communicate in. The assumptions here appear to be twofold: language is equally available to all, and language is basically translatable. Even if we were to move towards Hutchinson’s egalitarian “interactive conditions” for dialogue, I would suggest that not everyone would be able to effectively engage, either quantitatively or qualitatively, and thus there is the danger of the “dictatorship of

270. Coraf, supra note 5 at 22, 206.
271. Ibid. at 187.
272. Ibid. at 212.
273. Ibid.
275. Coraf, supra note 5 at 153.
276. Ibid. at 169.
277. Ibid. at 204.
the articulate." Consequently, I would suggest that his dialogic approach, like rights talk, is as he says "always limited and limiting," "an impoverished and impoverishing medium of political discourse." In the same way that rights talk could not guarantee women control over their bodies, dialogism contains no guarantees.

Moreover, I wonder if there is anything in the dialogic model that guards against majoritarianism? For example, he argues "[i]t was a triumph of popular will that made it possible for the Supreme Court to decide as it did in Morgentaler." Apart from some dubious echo of a Rousseauian 'general will', my concern here is for those who do not share the popular will which, as scholars like Beatty have argued, is the very reason for rights in the first place. In other words, is there a danger of conflating dialogic democracy with majoritarianism?

Secondly, although Hutchinson has a sophisticated conception of language, it is more than just a "social medium." To my mind, language also captures and refracts specific cultural norms and practices that are not always translatable. Hutchinson never considers whether the dialogue should be in a language other than English, for example French or First Nations languages. Indeed, some First Nations scholars have explicitly argued that 'equality' and 'justice', two concepts that are central to Hutchinson's project, are difficult

279. Cora, supra note 5 at 25.
280. Ibid. at 122.
281. Ibid. at 102-103.
282. Ibid. at 180.
283. Ibid. at 191.
284. See also R.F. Devlin, "Law, Postmodernism and Resistance: Rethinking the Significance of The Irish Hunger Strike" (1994) 14 Windsor Y.B. Access Just. 3 at 72-73.

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to fit within aboriginal world views.\textsuperscript{285} While I do not want to overstate the incommensurability argument, it seems to me that this is not just a political or moral problem, which would be serious enough, but also an epistemological one that Hutchinson fails to consider. Furthermore, Hutchinson proposes that dialogism must remain continually open, but again there are at least two problems here: do most citizens really have that much time available? And at some point, some decisions have to be made, even relatively temporary ones, and so some mechanisms for closure seem inevitable. Efficiency is not everything, but nor is it nothing. Hutchinson says little about the possibility and circumstances of closure.

Finally, there is the important question of the relationship between dialogue and action. While it is true that dialogue can be a form of action, it is also an important limitation that it is only one form of action. If, as I have suggested, it is true that dialogism cannot go far enough in its program of greater inclusion, the difficult question is, what are the oppressed to do when talking gets them nowhere? Towards the end of his book, Hutchinson flirts with the possibility of disruptive and activist tactics\textsuperscript{286} and the virtues of the "well placed Reebok."\textsuperscript{287} (Free corporate advertising?) The problem is that this discussion is much too brief because certain forms of action are in their nature silencing and therefore contradictory to the dialogic ethos. Are they thereby ruled out? Thus it seems to me that Hutchinson finds himself in a difficult situation: as a self-described radical he seeks dramatic social transformation; however, as a respectable university professor he cannot be perceived as advocating the direct action that might be required for such a project. Instead he opts for dialogic democracy, and indeed in his last few pages even waxes poetic.\textsuperscript{288} The problem with dialogism is its prioritization of dialogue over action. It conceives of politics as somehow analogous to the almost perfect jurisprudence seminar where

\textsuperscript{285} See \textit{e.g.} Monture-Angus, \textit{supra} note 125; and M. Turpel, "Patriarchy and Paternalism: The Legacy of the Canadian State for First Nations Women" (1993) 6 C.J.W.L. 174 at 180.  
\textsuperscript{286} \textit{Coraf}, \textit{supra} note 5 at 170.  
\textsuperscript{287} \textit{Ibid.} at 224.  
\textsuperscript{288} \textit{Ibid.} at 228-229.
each participant has his or her say and a thousand flowers bloom. Dialogue may be what academics do best, but is it the best possible strategy for those who are oppressed? Thus, in the same way that Hutchinson criticizes liberal legalism for being constitutively incapable of achieving the social transformations necessary to enhance social justice, I suggest that democratic dialogism is similarly stymied. It too is both ‘limited and limiting’ as an effective strategy for achieving Hutchinson’s expressed goal: radically egalitarian social reconstruction.

In short, when we unpack it, I would suggest the premise underlying the dialogic model is one of liberal contractualism — a regime of haggling, a world of offering and counteroffering, of giving and taking. But this is a deeply optimistic vision for, as Carol Pateman has pointed out, contract, rather than being the apotheosis of freedom and choice, might well be a highly refined form of subordination. In other words, by taking refuge in dialogism I am not sure that Hutchinson has managed to escape the “Lockean social contract” theory of which he is so critical.

Conclusion

In Part I, I indicated that Beatty and Hutchinson shared certain commonalities: a belief in textual indeterminacy and a critique of the record of the Supreme Court of Canada. Let me conclude by suggesting two more: a failure to be sufficiently programmatic and the danger of decontextualism.

On the programmatic side, Beatty seems to think that we are almost there, that with some minor tinkering and a judicial change of heart the integrity of law (and a socially just society) is within our grasp. But he has very little to say about how we might achieve

290. Cora/J, supra note 5 at 186.
such shifts. Hutchinson, on the other hand, argues that rights talk is taking us in the wrong direction and that large scale institutional and psychological transformations are urgently required. However, his proposed remedy of democratic dialogue seems to me to be unequal to the task of transition. Both authors have captured an important constitutional sensibility — Beatty the urge for autonomy and Hutchinson the craving for community — but each has failed to provide an account of how, in the short term, we might be able to make serious moves towards making either (or perhaps even both) sensibilities effectively achievable.

Furthermore, there is the tendency towards decontextualism. Both books are written in a passionate style and this is an undoubted plus. However, each has a touch of the messianic and in their desire to proselytize they each may overstate their case. Law as a terrain of struggle is uneven and it provides different opportunities and constraints for different participants in its different forms, in different locations and at different times. Each author is aware of this but it is underplayed in their analyses. Legal theory, as it has been conventionally practiced, has a tendency to demand that an author must espouse some sort of coherent argument the robustness of which should be compelling to all who might read it. But it may be that law itself is too messy, too complicated, too chaotic and too problematic to allow us to say yes or no. There may be no easy answers that can be captured by unidimensional appeals to either universal principles or dialogic practices. But we should be grateful to both Beatty and Hutchinson for providing us with their respective visions: neither is compelling but both are thought provoking. What more could we ask for? Truth? Eh?